Supreme Court, U.S.
FILED
MAY 24 1996
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(2)

No. 95-1741

In The

Supreme Court of the United States

October Term, 1995

MOODY H. DAVIS, PATRICIA DAVIS, and THE BURK B. ROBERTS TRUST,

Petitioners,

v.

STUART D. SHANOR, TRUSTEE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Stuart D. Shanor, Chapter 7 Trustee in Bankruptcy of Bellamah Community Development, ("Respondent") submits this brief to oppose the Petition for a Writ of Certiorari ("Petition") filed by Moody H. Davis, Patricia Davis and the Burk B. Roberts Trust ("Petitioners"). Respondent agrees with the "Opinions Below" and "Jurisdiction" portions of the Petition. Petition at 1-2.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Respondent believes that portions of two statutory provisions, in addition to those set forth in the Petition, are pertinent to this Court's consideration of the Petition. Section 502 of Title 11 of the United States Code provides in part:

> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that –
>
> . . . .
>
> (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

Section 503 of Title 11 of the United States Code provides in part:

> (a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –
>
> (1) . . .
>
> (B) any tax –
>
> (i) incurred by the estate, except a tax of a kind specified in section 507 (a)(8) of this title; . . .

RESPONDENT'S SUPPLEMENTAL STATEMENT

While Petitioners' "Statement" is basically accurate, there are several facts which Respondent believes should be considered by this Court in determining the disposition of the Petition. This case was originally brought by the Respondent seeking a declaration that he had acted appropriately by not using assets of the bankruptcy estate which would otherwise be available to pay unsecured creditors' claims, to pay *ad valorem* taxes on real property which he had abandoned pursuant to orders of the bankruptcy court.

Contrary to the position of the Petitioners, the question which determines the issue in this case and which

was properly decided by the Tenth Circuit Court of Appeals is: "What effect does the abandonment of real property have on a bankruptcy trustee's duty to pay outstanding ad valorem taxes assessed against that real property?" Respondent respectfully urges that his abandonment of the subject LakePointe Property renders the application of 28 U.S.C. §§ 959, 960 ("Sections 959 and 960") irrelevant in this case.

Bellamah Community Development ("Bellamah"), the debtor in this case, was a New Mexico general partnership which had substantial real estate holdings in New Mexico, Oklahoma, Texas, Colorado, and Arizona. One of the assets of Bellamah was the LakePointe Property located in Texas. Bellamah acquired the LakePointe Property from Respondents and one other party[1] and paid part of the consideration for that acquisition with a promissory note secured by a Deed of Trust. The Deed of Trust provided, among other things, that in the event Bellamah failed to pay the taxes due against the LakePointe Property, that Petitioners had the option of so doing, and could accelerate all amounts due under the terms of the Note and foreclose the Deed of Trust, or could add the amounts paid to the Note, which would then be secured by the Deed of Trust. After Bellamah's acquisition of the LakePointe Property, it granted subordinate Mortgages or Deeds of Trust against the real property to secure repayment of loans made to Bellamah by

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[1] Minnie Butler, who apparently died during the pendency of this appeal, was the other party from whom Bellamah acquired the LakePointe Property. Petition at ii.

two other entities. Those debts were also unpaid at the time of bankruptcy.

Respondent was appointed to act as Chapter 7 Trustee for Bellamah in February 1990 after the case had been converted to Chapter 7. Shortly after his appointment, Respondent sought authorization, pursuant to the provisions of 11 U.S.C. § 721, to operate Bellamah's business for a limited period of time and for a limited purpose – that is to allow him to sell some of the hundreds of residential lots which Bellamah owned for a designated minimum sales price, without the necessity of further Court order, and to allow him to continue the employment of several key employees for a limited period of time. An Order so providing was entered by the United States Bankruptcy Court for the District of New Mexico on March 20, 1990 ("the 721 Order"). Notwithstanding the inferences made by Petitioner, the 721 Order was not a general operating order, but was specifically limited in scope, restricting the Trustee to "limited" operations of the Debtor's business. The unrebutted evidence of record is that the Respondent only used that order (i) to sell specifically identified lots (none of which were located in the LakePointe Property) for a preapproved release price without necessity of further notice or court order, and, (ii) to continue to employ certain key Bellamah employees in its Albuquerque, New Mexico office. There is no evidence that Respondent ever operated the LakePointe Property. Petition Appendix ("App.") B at 10a, ¶ 6.[2]

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[2] The District Court concluded that "[t]he proffered evidence consists of obligatory operating reports, 11 U.S.C. § 704(8), and shows nothing more than the [Respondent] was

Prior to the commencement of its Chapter 11 case, Bellamah had ceased paying *ad valorem* taxes assessed against the LakePointe Property. Likewise, during the Chapter 11 case, Debtor did not pay any accruing or accrued *ad valorem* taxes assessed against that property. In August 1990, the holder of the second lien against the LakePointe Property moved to lift the Automatic Stay as to the LakePointe Property as well as other real property which collateralized its loan, and Petitioners sought to intervene in that proceeding. The Bankruptcy Court denied Petitioners' motion, expressly providing that Petitioners could, if they chose to do so, file their own Motion to modify the stay. Petitioners never sought to lift the automatic stay,[3] did not seek any adequate protection from the accumulating tax liens until the motion for the Second Abandonment was pending and never sought to compel abandonment. App. A at 7a.

In December 1990, Respondent sought leave to abandon most of the LakePointe Property, and an Order was entered authorizing such abandonment on January 23, 1991. More than two years later, in March of 1993, Petitioners moved to vacate that abandonment. Respondent opposed that motion. In July 1993, Petitioners withdrew that motion and the Bankruptcy Court determined that it had been withdrawn with prejudice.

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attempting to sell the property prior to abandonment." App. B at 10a, ¶ 6.

[3] Shortly after the Bankruptcy Court announced its order in this matter, Petitioners transferred their claim and lien position to a corporation they formed and the corporation obtained a modification of the automatic stay to conduct a trustee's sale under the Deed of Trust.

In November 1991, Respondent filed a Motion to abandon the remaining portion of the LakePointe Property ("the Second Abandonment"). Petitioners objected to the Second Abandonment, alleging that the Respondent was precluded from abandoning the LakePointe Property until the *ad valorem* taxes were paid. The Bankruptcy Court authorized the Second Abandonment. On appeal, the District Court affirmed the Bankruptcy Court's decision. Thereafter, Petitioners appealed the matter to the Tenth Circuit and, after all of the briefing had been completed, Petitioners dismissed the appeal.

Until August 1993, Petitioners took no action to obtain any kind of adequate protection, nor did they request that the property be abandoned. Prior to August 1993, except for objecting to the abandonment of the LakePointe Property and seeking to intervene in a lift stay proceeding, the only affirmative action which Petitioners took which was in any way related to the LakePointe Property was in 1992, when Petitioners filed an action in Texas ("the Texas Action") against the Respondent individually. The suit was predicated on Respondent's allegedly wrongful failure to pay *ad valorem* taxes assessed on the LakePointe Property pre-petition, as well as those taxes accruing during the Chapter 11 and the Chapter 7 proceedings.

Respondent filed this action to enjoin Petitioners from prosecuting the Texas Action, on the grounds that the claims made by Petitioners should not be brought outside Respondent's appointing forum. Respondent also sought a declaration that he had no authority to pay the *ad valorem* taxes which had accrued against the LakePointe Property. The Bankruptcy Court ruled that the

portion of the complaint seeking an injunction was a non-core proceeding. That portion of the case was severed and is still pending at the District Court. The requested declaration was granted and affirmed by the District Court and the Tenth Circuit primarily on the ground that a bankruptcy estate does not owe taxes on abandoned property. App. A at 5a-6a; and, App. B at 10a, ¶ 7. The Tenth Circuit also affirmed because the procedural requisites of 11 U.S.C. § 503 had not been followed so that the Trustee never had authority to pay any of the taxes. App. A at 7a. The Petition seeks review of that declaration.

It is noteworthy that none of the taxing authorities to whom *ad valorem* taxes were owed on the LakePointe Property ever filed any application with the bankruptcy court for payment of the *ad valorem* taxes. Rather, it is the secured creditors whose lien is primed who are complaining about the effect of abandonment of the property.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THE COURT CANNOT ANSWER THE QUESTIONS PRESENTED IN THIS CASE.

Neither of the questions presented by the Petitioners can be answered in this case. Respondent has never claimed immunity from any obligations imposed by Sections 959 and 960, nor has he claimed that the abandonment expunges any such obligations. Indeed, Petitioners would like nothing better than to see an immunity from or expungement of the *ad valorem* tax obligations as such a ruling would prevent a priming tax lien from attaching to the LakePointe Property.

Although Petitioners pose their Questions to this Court under both Sections 959 and 960, review of the Petition reveals that Petitioners do not make any argument under Section 959. Other than citing Section 959 in the two Questions, Petitioners only mention that statute twice in the remainder of the Petition. First, Petitioners quote from Subsection 959(b) in the mandatory "Statutory Provisions Involved" portion of the Petition. Petition at 2. The only other mention of Section 959 occurs in Petitioners' "Statement" when they observe that the Tenth Circuit stated that Sections 959 and 960 are applicable to an operating trustee. *Id.* at 6. Petitioners articulate no argument why Section 959 presents any question for review or how the Tenth Circuit committed any error with respect to its treatment of that statute. Petitioners' inclusion of Section 959 in the Questions Presented is only nominal.

Respondent has never claimed immunity from any obligations imposed by Section 960. The Tenth Circuit correctly decided that Section 960 does not affect the outcome in this case. Petitioners' entire Petition hinges on the perception that the applicability of Section 960 was decided because the Tenth Circuit stated in a clause that an "operating trustee is subject to Sections 959 and 960." App. A at 4a-5a. Petitioners glean from this comment that the Tenth Circuit ruled that Section 960 is not applicable to liquidating trustees or trustees engaged in liquidating activities. It did not.[4]

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[4] As is explained below, the distinction between operating activities and liquidating activities can be very important in determining the applicability of Section 959(b). *See* discussion at 23-24, *infra*.

Section 960 prevents bankruptcy trustees as officers of federal courts, from claiming immunity from state taxation.

> Section 960 . . . was passed in 1934, at the height of the intergovernmental tax immunity doctrine, in response to a Federal District Court decision holding that a bankruptcy receiver operating a gasoline and oil distributing business was not liable as matter of state law for a state sales tax on motor fuel. Read most naturally, the statute evinces an intention that a State be permitted to tax a bankruptcy estate notwithstanding any intergovernmental immunity objection that might be interposed. . . . and that, as a matter federal law, 'a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise.' *Palmer v. Webster and Atlas Nat'l Bank of Boston*, 312 U.S. 156, 163 (1941).

California State Board of Equalization v. Sierra Summit, Inc. 490 U.S. 844, 852 (1989) (footnotes and some citations omitted). Respondent has never raised any intergovernmental tax immunity objection to paying any *ad valorem* taxes. The Tenth Circuit did not rule that Respondent was immune from taxation in Texas. Accordingly, Section 960 does not affect the outcome of this case.

Petitioners erroneously state that ". . . the Tenth Circuit has apparently chosen to go its own way and hold that Section 960 does not apply to a liquidating Trustee, at least as to the payment of *ad valorem* taxes." Petition at 10. Even a cursory review of the Tenth Circuit's decision reveals that this characterization misapprehends that

decision. The Tenth Circuit recognized the fact that the taxes would have to be paid, and fully embraced Respondent's argument relating to the payment of *ad valorem* taxes, when it stated in its decision:

> As the trustee explains, in bankruptcy proceedings the payment of ad valorem taxes is subject to two basic approaches. If the trustee liquidates the property, the accumulated taxes could be paid as an administrative expense. 11 U.S.C. §§ 503(b)(1)(B) and 507(a)(7)(B). However, because ad valorem taxes are a burden upon, and follow the property, the second approach would be to reduce the liquidating price of the property to reflect the amount of the tax lien and convey the property subject to the taxes. In such a transaction, the purchaser becomes liable for the ad valorem taxes.

App. A at 6a. The Tenth Circuit's pronouncement as to how *ad valorem* taxes are to be dealt with within a bankruptcy context is entirely consistent with this Court's construction of Section 960 and the construction of other courts.

Petitioners's real complaint is that the *ad valorem* taxes assessed the LakePointe Property prime their lien. This is exactly the same result that would have occurred if Bellamah " 'would have been in possession and operating the enterprise.' " *Id.* at 852 (quoting *Palmer v. Webster and Atlas Nat'l Bank of Boston*, 312 U.S. at 163). Prior to bankruptcy and during the pendency of the Chapter 11 proceeding, Bellamah failed to pay *ad valorem* taxes assessed on the LakePointe property. Outside bankruptcy, Petitioners would have been faced with a situation of either losing their lien position in a tax foreclosure suit;

paying the taxes and adding them to the secured, non-recourse debt; or, foreclosing the property subject to the tax liens. Petitioners seek a result from the Chapter 7 proceeding that they could not have achieved outside bankruptcy – having the taxes paid as a priority debt out of the assets of Bellamah. Section 960 was not designed to provide a windfall to secured creditors, but instead to protect the fiscs of state and local governments from intergovernmental tax immunity claims. This is not a case of the taxing authorities seeking payment, but secured creditors complaining that the taxing authorities are being paid in the exact manner that they would have been paid outside of bankruptcy.

This Court approved a similar result in *Boteler v. Ingels*, 308 U.S. 57 (1939). In that case, the Court was faced with California vehicle licensing and registration fee laws which provided that registration fees were due by January 1 on motor vehicles operated within the state during that calendar year and were subject to a penalty if paid more than 30 days late. *Id.* at 58. As is true with Texas *ad valorem* tax laws on real property, California had a statutory lien on automobiles for which the registration fees and applicable penalties were not paid. *Id.*[5] The trustee in *Boteler* utilized the estate's vehicles in California for two months without paying the taxes or penalties. *Id.* He then attempted to sell the vehicles free and clear of liens and pay only the taxes, without the penalties. The Ninth Circuit overturned the district court's ruling that penalties were not due, "ordering alternatively that accrued

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[5] *See*, Texas Property Code § 32.01(a) (Vernon's Supp. 1996).

fees and penalties be paid, or that the vehicles be disposed of subject to the lien of the State for the unpaid taxes and penalties." *Id.* (footnote omitted). This Court examined Section 960 (then codified at 28 U.S.C. § 124a) and affirmed, observing that Section 960 "indicates a congressional purpose to facilitate – not to obstruct – enforcement of state law; the court below correctly recognized and applied this congressional purpose and its judgment is affirmed." *Id.* at 61. Thus, the trustee in *Boteler* either had to pay the taxes and penalties or dispose of the property subject to the California's statutory lien for the unpaid taxes and penalties. Here, Respondent was unable to sell the property and pay the taxes from the proceeds so he "disposed" of the property by abandonment "subject to" the state taxing authorities' liens on the property for accrued tax liability.

II. THE TENTH CIRCUIT CORRECTLY APPLIED THE RELATION BACK DOCTRINE IN THIS CASE.

The Tenth Circuit relied upon the well-understood effect of abandonment, sometimes called the relation back doctrine, in reaching its ruling. App. A at 5a-6a citing *Dewsnup v. Timm*, 908 F.2d 588, 590 (10th Cir. 1990), *aff'd* 502 U.S. 410 (1992). Under the relation back doctrine, title to abandoned property "reverts to the debtor and stands as if no bankruptcy petition had been filed . . . [a]nd is *not* property administered by the estate." *Id.* at 590. The relation back doctrine is not a construct of the Tenth Circuit but is a long-standing rule of bankruptcy law already well-recognized when it was articulated under the Bankruptcy Act by this Court more than fifty years

ago: "Whatever title or inchoate interest may have passed to the [bankruptcy] trustee was extinguished by relation as of the filing of the Petition when the Trustee informed the court [the subject property was] burdensome . . . and was directed by the court to abandon and disclaim [it]." *Brown v. O'Keefe*, 300 U.S. 598, 602 (1937) (citations omitted).[6] *See also* discussion at 16-22, *infra* (discussing the viability of the relation back doctrine).

There is a clearly traceable congressional intent to eliminate a bankruptcy estate's liability for *ad valorem* taxes by permitting abandonment and forcing the collection of those taxes from the taxed property. Congress evidenced its intent to achieve this result when it amended Section 64a(4) of the Bankruptcy Act (the predecessor provision to 11 U.S.C. § 502(b)(3)) in 1926:

> The important expansion of Section 64a(4) . . . was Congress's response to a situation which often saw estates almost entirely depleted by taxes to the detriment of unsecured creditors in

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[6] Although clearly articulated and adopted by this Court under the Bankruptcy Act, the relation back effect of abandonment was first acknowledged by this Court in *Glenny v. Langdon*, 98 U.S. 20, 30-31 (1878). In *Glenny*, this Court stated that relation back "has long been a recognized principle of the bankruptcy law. . . . and there are numerous decisions, English and American, which support the proposition." *Id.* This principle was applied by this Court in at least three other cases prior to the adoption of the Bankruptcy Act of 1898. *Sessions v. Romadka*, 145 U.S. 29, 39 (1892); *Sparhawk v. Yerkes*, 142 U.S. 1, 13 (1891); and, *American File Co. v. Garrett*, 110 U.S. 288, 295 (1884). Accordingly, at the time of the adoption of the Bankruptcy Code in 1978, it had been 100 years since this Court had stated that the relation back effect of abandonment "has long been a recognized principle" of the bankruptcy law.

> spite of the fact that such property was thereafter abandoned to the mortgagee or the taxing authorities. This was so because such taxes were construed, under many state statutes, to be taxes legally due and owing by the bankrupt personally although they might have been liens on the real estate as well.
>
> The injustice of such payments was apparent since the payment of taxes from the bankrupt estate would have the effect of clearing away tax claims which otherwise would have remained charges on real estate in the hands of mortgagees. . . . After the amendment was made in 1926, *the trustee, by the simple process of abandonment of heavily encumbered real estate could reduce the interest of the estate to nothing.*

3 King, *Collier on Bankruptcy* ¶ 502.02 [4] at ns. 29e-29f (15th ed. 1996) (emphasis added). Thus, in bankruptcy, there are two options for treatment of *ad valorem* taxes assessed on property on which the bankruptcy estate is unable to realize equity: (1) a taxing authority can look to the property on which it has a statutory lien; or, (2) payment of the taxes can be made out of the unencumbered assets of the estate. Under either option, the taxing authorities are paid in full. If the taxes are paid out of the estate's unencumbered assets, payment is made out of the pockets of the unsecured creditors, for the sole benefit of the secured creditor.

Example best shows the effect of the two options. Assume that a bankruptcy estate owns a $10 million worth of property encumbered by $1 million in *ad valorem* tax liens and a $12 million mortgage. The trustee seeks to

abandon the property as burdensome. But for abandonment and the no equity position, the *ad valorem* tax claims would be allowable as administrative and/or unsecured priority claims. In this fictitious estate, there is $2 million to distribute to unsecured creditors after payment of all administrative and other priority claims, not including the $1 million in *ad valorem* taxes. Except any deficiency claim by the mortgagee, there are $17 million in unsecured claims.

Under the option in which the estate pays all of the taxes, the mortgagee would have allowable unsecured claims of $2 million,[7] and there would be $1 million left to distribute pro rata to the unsecured creditor pool of $19 million for a dividend of about 5.2%. Under the second option the taxes are paid out of property, the mortgagee would have an allowable unsecured claim of $3 million after crediting the remaining $9 million in value of the property and there would be $2 million to distribute to a $20 million pool of unsecured claim for a 10% dividend. The taxes are paid in full under both options. The only issue is whether the fully unsecured creditors should bear the full brunt of the taxes benefiting only the secured creditor. An additional economic difference between the two options is that the mortgagee may have to pay the tax claims to protect its interests under foreclosure. The issue is one of basic fairness – whether a single secured creditor or the entire pool of unsecured creditors should

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[7] The full $10 million value of the property would be credited against the mortgagee's claims under 11 U.S.C. § 506(a). *Bates v. United States (In re Bates)*, 974 F.2d 1234, 1236 (10th Cir. 1992).

be the beneficiary of the bankruptcy administration. Congress has clearly opted for the second option. The effect of 11 U.S.C. § 502(b)(3) is to eliminate all pre-petition tax claims that might otherwise obtain priority under 11 U.S.C. § 507(a)(8)(B) while abandonment, through the relation back doctrine, eliminates any post-petition claims.[8]

Petitioners suggest that Congress' failure to expressly adopt the relation back doctrine within Section 554 should be interpreted to be a rejection of the concept. Petition at 10-11. However, Petitioners cite no authority for this mode of statutory interpretation and this Court has adopted a completely opposite approach under the Bankruptcy Code. Specifically, this Court presumes Congress to have intended to continue to use practices under the Bankruptcy Act absent either unambiguous statutory language or intent expressed in legislative history to change that practice under the Bankruptcy Code. *See, e.g., Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) ("*Dewsnup II*") (citing additional authority); *Midlantic Nat'l Bank v. New Jersey Dep't of Envntl. Protection*, 474 U.S. 494, 501 (1986). *See also United States v. Noland*, 64 U.S.L.W. 4328, 4329 (U.S. May 13, 1996) (citing *Midlantic* as authoritative for the proposition that Congress must make its intent specific in the legislative history or the statute to change pre-Code practice).

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[8] Petitioners correctly state that U.S.C. § 502(b)(3) does not apply to post-petition taxes. Petition at 14, n. 12. However, none of the cases cited by Petitioners involve abandonment and none so much as mention Congress's intent that abandonment coupled with 11 U.S.C. § 502(b)(3) should defeat an estate's tax liability for abandoned property.

Indeed, *Midlantic* disposes of Petitioners' construction argument. That case dealt with abandonment under Section 554. This Court recognized that abandonment was a "judicially developed rule." *Id.* Although there is no express exception to the power of abandonment in Section 554, this Court found that three lower court cases decided under the Bankruptcy Act conditioned the right to abandon when issues of public health and welfare were involved, thereby establishing "a corollary" to the power to abandon. *Id.* at 500-01. This Court held that those early cases were not overruled by Section 554 as Congress did not make "specific" its "intent" to do so in the legislative history or statute. *Id.* at 501. The same construction rules must apply to the same statute when considering the much more prevalently recognized relation back doctrine.

As Petitioners observe, there is no language in the Bankruptcy Code that expressly rejects or adopts the relation back doctrine. Petition at 10-11. Likewise, the legislative history does not mention the relation back doctrine which had been clearly articulated and adopted under the Bankruptcy Act by this Court more than forty years before the Bankruptcy Code was adopted and utilized by this Court under the Bankruptcy Act of 1867 since 1878. *See* discussion at n.6, *supra*. Under these circumstances, "this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice." *Dewsnup II*, 502 U.S. at 419. This mode of statutory interpretation is even more compelling since the relation back effect of abandonment has always been a judicial construct and

Congress did not express any intent that the Bankruptcy Code would overrule that authority. *See, e.g.*, H. R. Rep. No. 595, 95th Cong., 1st Sess. 179 (1977) *reprinted in* App. Vol. 2 King, *Collier on Bankruptcy* (15th ed. 1996) (indicating congressional intent to overrule *Caplan v. Maine Midland Grace Trust Co.*, 406 U.S. 416 (1972) concerning a trustee's standing to enforce claims of creditors of a bankrupt corporation against third parties).

Twice this Court has implicitly recognized the continuing vitality of the relation back effect of abandonment under the Bankruptcy Code. First, in *Ohio v. Kovacs* this Court observed that abandonment of contaminated property would shift the clean up costs to "its prior owner, who would have to comply with the state environmental law to the extent of his or its ability." 469 U.S. 274, 284-85 n.12 (1985). Second, in *Midlantic*, the dissent recognized that the ultimate issue was over who paid for the clean up, not over whether it would occur: "The New Jersey Department of Environmental Protection . . . apparently seeks to undo the abandonment and force the trustee to expend the estate's remaining assets cleaning up the site. . . . " 474 U.S. at 516-17 (Rehnquist, J. dissenting). Implicit in both cases is that the effect of abandonment is that the respective estates never owned the properties and therefore could not be held liable for any clean up costs.

Petitioners cite a First Circuit case as critical of the relation back doctrine. Petition at 12-13 citing *United States v. Grant*, 971 F.2d 799 (1st Cir. 1992) (en banc). The *Grant* case was an appeal from a conviction for concealment in a bankruptcy. The defendant/debtor was convicted of fraudulently concealing nine valuable prints

from the trustee. *Id.* at 801-802. On appeal the defendant argued that the prints had been abandoned and, by virtue of the relation back doctrine, the government could not prove that he had concealed "property belonging to the [Chapter 7] estate" within the meaning of 18 U.S.C. § 152. *Id.* at 802-803. The defendant pointed to a settlement agreement between the trustee and the defendant that required the trustee to abandon "all property and furnishings located" in his home. *Id.* 803, n.4. The defendant claimed that the "abandonment revested title in the same entity which held it at the commencement of the case and any interim concealment of the prints was nullified retroactively." *Id.* 803.

The First Circuit's criticism of the relation back doctrine is pure *dicta*. The First Circuit found the assertion that an abandonment of the prints had occurred was "a dubious proposition at best" for two reasons. *Id.* at 803. First, the abandonment occurred only as to property and furnishings in the defendant's home. Only two prints were in the defendant's home before the supposed abandonment. Accordingly, even in the light most favorable to the defendant, seven of the prints which he was convicted of concealing were not abandoned. *Id.* at 803 n.4. Second, the settlement agreement under which the abandonment occurred specifically excluded from its release "claims related to . . . assets wrongfully retained or withheld by the [d]efendant." *Id.* The First Circuit concluded that the abandonment "contemplated by the settlement agreement reasonably can be interpreted to exclude prints still *being concealed* from the trustee at the time of the abandonment" so that the conviction for

continuing concealment for all nine prints was valid. *Id.* (emphasis in original).

Additionally, before suggesting that the relation back doctrine was no longer viable under the Bankruptcy Code, the First Circuit correctly identified it as legal fiction[9] and concluded "its extension to criminal proceedings for bankruptcy fraud arising out of a Chapter 7

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[9] Petitioners seem to think that the term "legal fiction" is a pejorative. Petition at 12-13. One of the cases that Petitioners cite for "criticizing" the relation back doctrine actually applies it as "it fits this case appropriately." *Rosenblum v. Dingfelder,* 111 F.2d 406, 409 (2d Cir. 1940). The second case cited by Petitioner merely stands for the proposition that a debtor cannot use the relation back doctrine to enrich himself at the expense of his creditors, a proposition that is irrelevant to this case. *Wallace v. Lawrence Warehouse Co.*, 338 F.2d 392, 394-95 (9th Cir. 1964). The academic commentator who Petitioners cite for advocating "a comprehensive model" to remedy "the confusion in results of abandonment on tax matters", does suggest a model for the income tax effects of abandonment but does not discuss *ad valorem* taxes. Petition at 12, n.11, citing Jack F. Williams, *Tax Consequences of Abandonment Under the Bankruptcy Code,* 67 Temple L. Rev. 13 (1994). While Professor Williams is critical of continued reliance on the relation-back doctrine he does not believe that a bankruptcy trustee or estate actually ever takes title to abandoned property:

> The [Bankruptcy Code] does not contemplate the displacement of the debtor's interest in his or her property; rather [it] provides for the subordination of the debtor's interest to the trustee's hypothetical judicial lien for the benefit of the estate . . . Abandonment is best viewed as a disclaimer of interest in estate property by a trustee as the representative of the estate. The rights and responsibilities that existed in the property immediately before the bankruptcy filing remain with the debtor throughout the administration of the case,

would disserve the interests of justice that the 'relation back' doctrine was designed to serve." *Id.* at 803-804 (citations omitted). Thus, the criticism of the relation back doctrine was, at best, the fourth reason for affirming the convictions. Just as relation back should not be a defense in criminal proceedings, the First Circuit was improvident in trying to decide whether relation back retains any vitality under the Bankruptcy Code. *See* James L. Shepard, *The Trustee's Bankruptcy Tax Manual* 3-4 (1992) (concluding that *Grant* should be limited to criminal cases).

The First Circuit correctly concluded that some reasons for the relation back doctrine no longer existed under the Bankruptcy Code. *Id.* at 804-805. However, among other things, it completely failed to consider the effect of relation back on *ad valorem* tax liability. The First Circuit did not recognize the congressional intent of coupling the relation back effect of abandonment with a statutory provision (now 11 U.S.C. § 502(b)(3)) that has existed for seventy years to eliminate an estate's liability for *ad valorem* taxes on burdensome property. *See* discussion at 13-14, *supra*. Additionally, the First Circuit did not so much as acknowledge one of the five decisions from

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> subject to the trustee's judicial lien power. In other words, abandonment of the property is a trustee's disclaimer of its judicial lien. . . .

Id. at 34-36, nn. 147 & 159-60. *Cf. Brown v. O'Keefe, supra,* (equating abandonment to a rejection of a gift). If Professor Williams is correct, his view of the effect of abandonment leads to the same result in this case since a person who disclaims a judicial lien in property is not liable for *ad valorem* taxes assessed against the property.

this Court adopting and applying the relation back doctrine. At best, *Grant* stands for the proposition that "blind adherence" to the relation back doctrine is inappropriate. Williams, *supra*, 67 Temple L. Rev. at 37. *Grant* is simply not authoritative or persuasive on the continuing viability of the relation back doctrine under the Bankruptcy Code.

III. THE DECISION BELOW DOES NOT REQUIRE AN ANALYSIS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 721 OF THE BANKRUPTCY CODE.

While their argument is circumspect, Petitioners apparently claim that this Court should grant their Petition because the Tenth Circuit erred in determining that Respondent did not operate the LakePointe Property, even after having received a 721 Order which authorized him to conduct certain limited operations of the Debtor. Petitioners assert that operations pursuant to 11 U.S.C. § 721 are an "all or nothing" proposition, and that the Trustee cannot operate only a portion of the Debtor's business. Petition at 16. Petitioners fail to articulate the reason why they believe the Courts below committed reversible error in determining that Respondent did not operate the LakePointe Property. Based on the Questions presented to the Court, one can only surmise that Petitioners are suggesting that if Respondent operated the business of the Debtor, then he was obligated to pay *ad valorem* taxes on the LakePointe Property out of unencumbered estate assets. However, the issue of whether Respondent was operating the LakePointe Property is

irrelevant for purposes of analyzing the Questions presented by Petitioners, because Respondent has never claimed, nor did the Tenth Circuit find, that Respondent was immune from *ad valorem* taxation.

In the courts below, the issue as to whether Respondent was operating the LakePointe Property was material because Petitioners were urging that Section 959(b) placed limits on a bankruptcy trustee's authority to abandon property which he operated. *See* § 959(b) (requiring trustee's to "manage and operate" property in his possession "according to the . . . laws of the state in which the property is situated . . . "). Respondent vigorously asserted, and the court below agreed, that his actions with respect to the LakePointe Property did not amount to his carrying on business with respect to the LakePointe Property, and accordingly ruled that Section 959(b) was not applicable.

The property and transaction focused analysis by the Tenth Circuit was made in the context of Section 959, not 11 U.S.C. § 721, and is consistent with all reported authority. Contrary to the all-or-nothing approach advocated by Petitioners, courts considering Section 959 issues have used a "property focused" or "transaction focused" analysis. In so doing, they have examined whether the activities undertaken by the Trustee with respect to a particular property constituted operating the business as opposed to liquidation. In *Vass v. Conron Bros. Co.*, 59 F.2d 969 (2d Cir. 1932), a Trustee assumed and performed a debtor's pre-petition lease. In interpreting 28 U.S.C. § 125, an earlier codification of Section 959, Judge Learned Hand stated, "Merely to hold matters in the status quo; to mark time, as it were; to do only what is

necessary to hold the assets intact; such activities are not a continuance of the business." *Id.* at 971. *See also Allard v. Weitzman (In re Delorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993) (suing to avoid a fraudulent conveyance is not "carrying on business" under Section 959(a)); *Rothberg v. Kirshenbaum* (*In re Beck Industries*), 725 F.2d 880, 887 (2d Cir. 1984) (actions taken in furtherance of liquidation, even in a reorganization case, did not subject the Trustee to suit in a non-appointing forum pursuant to Section, 959 (a)). Indeed, Petitioners' argument that there can only be operations, as opposed to liquidation, while a trustee has authority under 11 U.S.C. § 721 is rejected by the terms of the statute itself which requires that any operations be "consistent with the orderly liquidation of the estate."

In the case now before the Court, no evidence was ever presented which indicated that the Trustee did anything with the LakePointe Property except what was necessary to preserve and liquidate that property. The Texas office out of which that property had been operated was closed prior to the Trustee having received his limited authority to operate the business, and none of the individual residential lots which the Trustee sought to sell under the terms of the limited 721 Order were lots located in LakePointe.

In any event, whether the Trustee was operating the LakePointe Property is irrelevant to any determination regarding the LakePointe Property's *ad valorem* taxes. Under Section 960, a bankruptcy trustee is subjected to federal, state, and local taxes to the same extent as the debtor would have been, had he remained in possession. Respondent does not dispute that the taxes have accrued,

nor does he claim that the LakePointe Property is not subject to *ad valorem* taxes. Instead, he asserts that once the property was abandoned, it was as though it were never part of the bankruptcy estate and the estate is not liable for such taxes.

Neither Section 960 nor 11 U.S.C. § 721 sets out how and/or when liabilities to which a trustee in bankruptcy is subject are to be paid. This Court, and the parties hereto, must look to applicable provisions of the Bankruptcy Code for that determination, and for the procedures which must be utilized to obtain such payment. *See* discussion at 27-29, *infra* (procedure required to post-petition claims).

While Petitioners claim that this Court should promulgate a definitive standard by which the actions of a 721 trustee are to be measured, in light of the fact that the Respondent is not claiming immunity for *ad valorem* tax liability, Petitioners have failed to articulate any reason whatsoever why any judicial construction of 11 U.S.C. § 721 would assist in the proper resolution of this case.

IV. THIS IS NOT AN IMPORTANT CASE AND REVIEW BY THIS COURT IS NOT WARRANTED.

Petitioners seek review of an unpublished opinion by the Tenth Circuit. The Tenth Circuit specifically recites that its Order and Judgment in this case "is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel." App. A. at 1a, n.*. Thus, at most, the effect of the ruling below will be to bind those parties and their privies and to create law of

the case for the entire Bellamah bankruptcy. *See Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir. 1990) (the entire bankruptcy case is the "case" law for the case purposes so that a ruling in one adversary proceeding can involve all litigation occurring within a bankruptcy case). Thus the ruling below is of limited precedential value, even in the Tenth Circuit.

Petitioners' argument that this case presents important issues which require resolution by this Court is belied by the dearth of authority on the effect of abandonment on *ad valorem* tax claims. Petitioners do not cite a reported decision reflecting the effect on a bankruptcy estate's liability for taxes because of the application of the relation back doctrine.

Respondent can locate only two reported decisions under the Bankruptcy Code in which the relation back doctrine is used to defeat claims that a bankruptcy estate ought to pay taxes on abandoned property or that a tax liability associated with the abandoned property should be trapped within the bankruptcy estate. *In re Nevin*; 135 B.R. 652 (Bankr. D. Haw. 1991); and *In re Skinner Lumber Co.*, 35 B.R. 31 (Bankr. D.S.C. 1983). Only the *Skinner Lumber* case involved *ad valorem* tax liability. That court held that the relation back doctrine served to defeat any claim for administrative expense priority for *ad valorem* taxes assessed against the abandoned property. 35 B.R. at 32. Like this case, *Skinner Lumber* involved a creditor whose debt was secured by the abandoned property seeking to have the estate pay the taxes on a priority basis rather than having the tax claim disallowed. *Id.* at 31. The

Nevin case involved a debtor's opposition to abandonment of a partnership interest. 135 B.R. at 653. The bankruptcy court observed that the abandonment would shift the tax liability attributable to the partnership interest from the estate to the debtor and ruled that such a shift was appropriate. *Id.* at 654. In *Nevin*, the Internal Revenue Service sought to compel the abandonment and therefore the shifting of the tax liability from the estate to the debtor. *Id.* at 653.

In the light most favorable to the Petitioners, there are two published opinions from bankruptcy courts, and no published decisions from either a district or a circuit court of appeals on this point. The virtual absence of reported decisions, and the fact that those few decisions that exist do not involve complaints of taxing authorities that they are not being paid taxes otherwise lawfully due to them makes the case for issuance of a writ of certiorari extremely uncompelling.

V. EVEN IF PETITIONERS ARE CORRECT CONCERNING THE EFFECT OF ABANDONMENT, THE TENTH CIRCUIT'S RULING MUST BE AFFIRMED.

The Tenth Circuit affirmed on an independent ground upon which the Petitioners do not seek review. The Tenth Circuit ruled that there was no authority to pay the *ad valorem* taxes as there had been "no request for payment by the taxing authorities" under 11 U.S.C. § 503(a). App. A at 7a. Petitioners argue that obligations occurring under Section 960 are "not limited by 11 U.S.C. § 503(a)". Petition at 14, n.12. However, Petitioners ignore

the plain language of 11 U.S.C. § 503 in making any suggestion that the Respondent was authorized to pay post-petition taxes without a "request for payment" under 11 U.S.C. § 503(a) and the obligatory "notice and a hearing" under 11 U.S.C. § 503(b). The "request for payment" and "notice and a hearing" requirements of § 503 apply to "any tax incurred by the estate, except a tax of a kind specified in a section 507(a)(8)."[10] 11 U.S.C. § 503(b)(1)(b)(i). It is contrary to the plain language of the Bankruptcy Code to suggest that *ad valorem* tax claims can be paid without a request for payment and then notice and hearing. Although decided under the Bankruptcy Act, the only reported decison considering whether taxes accruing against a bankruptcy estate under Section 960 are to be paid without observing the procedural requirements of bankruptcy law holds that such taxes are not "entitled to special treatment" and that Section 960 "does not dispense with the necessity for [the taxing authorities] making timely demand for their payment in the receivership proceeding." *McColgan v. Maier Brewing Co.*, 134 F.2d 385, 388 (9th Cir. 1943).

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[10] The taxes described in 11 U.S.C. § 507(a)(8) are either assessed pre-petition or relate to pre-petition transactions. As to *ad valorem* taxes, 11 U.S.C. § 507(a)(8) only applies to "a property tax assessed before commencement of the case unless payable without penalty one year before the date of the tax of the petition". *Id.* at (8)(B). Since Petitioners are only complaining of the effect of the Tenth Circuit's ruling on post-petition taxes, this provision is not applicable. Also, the provisions of § 507(a)(8) are not applicable to Texas property taxes since that subsection is only applicable to "unsecured claims of governmental units" while Texas taxing authorities have a lien on the property for which they assess taxes. *See* n.5, *supra*.

At best, all Petitioners can hope for by obtaining a writ of certiorari is to eliminate the Tenth Circuit's primary holding in this case. Even if successful in that endeavor, Petitioners still lose as there was neither a "request for payment" nor "notice and a hearing", both of which are required under Section 503 before the Trustee would have been authorized to pay the subject taxes. Also, if Petitioners are correct that 11 U.S.C. § 503 is inapplicable to these taxes by virtue of Section 960, they do not raise that issue in the Petition. The Tenth Circuit's ruling on this point does not, by any stretch of the imagination, create immunity from taxation or expungement of a tax obligation so as to fit within the two Questions for which Petitioners seek the review of this Court. Rather the Tenth Circuit's secondary holding is that, regardless of the effect of abandonment, the procedural requirements necessary to authorize the Trustee to pay the taxes were not fulfilled. Petitioners have not asked this Court to review whether a "request for payment" under Section 503(a) or "notice and a hearing" under Section 503(b) are necessary for a trustee to have authority to pay post-petition *ad valorem* taxes.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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